Nos. 87-1729 and 88-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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v.

PETER MONSANTO,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Second Circuits

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

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INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 347,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges, legislators, law enforcement and correc-

tions personnel, law students, and a number of non-lawyer "associates" in allied fields. From its inception more than 100 years ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel in our adversary system of criminal justice. Because the right to counsel and the preservation of an adversarial system of criminal justice are matters central to the administration of justice, the ABA seeks to appear as amicus curiae.

These cases raise the fundamental question of whether fees paid to a defense attorney rendering legitimate services in a criminal case should be subject to criminal forfeiture. The ABA recognizes that the government has a legitimate interest in the forfeiture of assets obtained through criminal activity. Nevertheless, the ABA opposes pre-trial restraints on the payment of bona fide atorneys' fees or the post-trial forfeiture of bona fide attorneys' fees absent reasonable grounds to believe that the fee payments are a mere sham or fraudulent transfer to protect a defendant's assets from forfeiture.

After Congress enacted the Comprehensive Forfeiture Act of 1984 (the "CFA"), the ABA carefully examined the impact of the enhanced forfeiture laws on our criminal justice system. Based on a report submitted by the Criminal Justice Section on July 9, 1985, the ABA House of Delegates adopted a resolution stating:

> That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect the illegal activity of a client.

ABA, Reports with Recommendations to the House of Delegates, Report No. 108A (July, 1985).

In August of 1986, the ABA adopted a further resolution, again accompanied by a Criminal Justice Section Report, stating:

> That the American Bar Association disapproves of the use of statutory forfeiture provisions in pretrial and other orders to prevent a defendant from paying counsel of choice or paying other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe that these payments constitute a sham, fraud, or criminal conduct.

ABA, Reports with Recommendations to the House of Delegates, Report No. 136A (August, 1986).

In furtherance of these declared policies, the ABA appears in these cases to voice its opposition to fee forfeiture and to underscore the deleterious impact that forfeiture of bona fide attorneys' fees will have on our system of criminal justice.

SUMMARY OF ARGUMENT

Application of the forfeiture provisions of the CFA to legitimately earned attorneys' fees would bring about a fundamental restructuring of our adversary system of criminal justice and threaten core constitutional values which lie at the heart of the guarantee to a fair trial. The fee forfeiture provisions potentially apply to 25% of the criminal cases brought in federal court, including all drug, obscenity and money-laundering offenses. Yet, the sweeping consequences spawned by application of the forfeiture provisions in this context would be the unintended result of a statute clearly aimed elsewhere.

The relation-back doctrine at issue in this case was intended only to prevent sham transactions in anticipation of forfeiture. Ironically, legitimate attorneys' fees are swept into the statutory scheme only because of the special nature of the attorney-client relationship. Unlike any other legitimate provider of pre-conviction services

to the defendant, the criminal defense attorney is required to seek out information on the charges against his client. Yet, acquiring the information necessary to conduct a competent defense is precisely what makes the attorney vulnerable to fee forfeiture, because the lawyer is almost by definition on notice that the client's property may be subject to forfeiture. The privileged, confidential relationship between attorney and client, which is so central to due process protections for the criminally accused, is therefore seriously undermined by the threat of fee forfeiture.

Nothing in the legislative history of the CFA remotely suggests that Congress intended this result. Basic principles of statutory construction dictate that the statute should be construed to avoid the grave constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

Moreover, even if Congress had explicitly included legitimate attorneys' fees within the CFA, the Constitution would prohibit this gross governmental interference with the rights of the accused. The Sixth and Fifth Amendments independently mandate that the CFA be held unconstitutional as applied to legitimately earned attorneys' fees. The forfeiture of assets necessary to pay such fees violates the Sixth Amendment by interfering with the defendant's right to counsel of choice. Pretrial restraints on the payment of bona fide attorneys' fees, as a practical manner, will prevent the defendant from using his assets to hire counsel of choice even before his guilt or innocence has been adjudicated or any verdict of forfeiture concerning those assets has been rendered. The specter of forfeiture not only could deter counsel from undertaking a representation in the first instance but could force existing counsel to withdraw. Besides the risk of non-payment, defense counsel would confront ethical rules against accepting representation in which payment is contingent upon the outcome of trial. The

government can demonstrate no countervailing interest sufficiently compelling to justify this substantial infringement on the defendant's constitutional right to choose counsel.

Moreover, fee forfeiture creates a disincentive for defense counsel to learn information about his client's activities because this might imperil counsel's ability to make the required statutory showing that he had no knowledge that the client's assets were forfeitable. The conflict thus created between the lawyer's duty to prepare the case as thoroughly as possible and his efforts to retain his fee will undermine the defendant's unqualified right to effective assistance of counsel. On a more general level, the practice of fee forfeiture will deter counsel from accepting representation in complex criminal cases and thus may inhibit the education and development of qualified defense attorneys, a prospect of institutional concern to the ABA.

In addition, fee forfeiture violates the Fifth Amendment guarantee of due process in that it affords the government unparalleled control over a defendant's ability to defend himself prior to an adjudication of guilt, thus compromising the right to a fair trial that is the cornerstone of our criminal justice system. Prior restraints on bona fide attorneys' fees allow the government to force withdrawal of retained counsel at a time of its choosing, merely by making unproved allegations of forfeiture in the indictment or by seeking pre-trial restraint of assets. Thus, fee forfeiture will vest the government with a powerful new weapon—significant control over the resources of the defendant, his selection of counsel, and the means by which an accused presents his criminal defense. This unprecedented intrusion into the attorney-client relationship is incompatible with our adversary system of criminal justice.

For all of these reasons, the ABA believes that pretrial restraints on fees and the threat of possible forfeiture after trial infringe upon a defendant's Sixth and

Fifth Amendment rights. In light of these serious constitutional problems, and in the absence of an unequivocal expression of Congressional intent to authorize fee forfeiture, the ABA urges this Court to construe the CFA narrowly so as not to encompass the forfeiture of bona fide attorneys' fees.

ARGUMENT

I. THE CFA DOES NOT AUTHORIZE THE FORFEITURE OF BONA FIDE ATTORNEYS' FEES PAID TO DEFEND THE ACCUSED IN A CRIMINAL CASE.

It must be acknowledged at the outset that the forfeiture provisions of the CFA, on their face, broadly cover all property derived from alleged criminal activity and contain no specific exemption for property used to pay bona fide attorneys' fees. Yet this Court has ample discretion to construe the statute to avoid results that are both constitutionally unsound and unintended by Congress. Criminal defense attorneys are the only providers of legitimate pre-conviction services whose relationship with the accused is constitutionally protected. At the same time, and precisely because of that constitutionally protected relationship, they are also the only providers of legitimate pre-conviction services whose fees would be routinely subject to forfeiture. Nothing in the legislative history or the statute itself suggests that Congress intended this anomalous result. Moreover, fundamental principles of statutory construction require that the statute be construed to avoid the profound constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

The Comprehensive Forfeiture Act of 1984,[1] was enacted to correct specific deficiencies in existing crim-

[1] The Comprehensive Forfeiture Act was enacted as Chapter III of the Comprehensive Crime Control Act of 1984, P.L. No. 98-473, §§ 301-322, 98 Stat. 1837 (1984).

inal forfeiture law. The "relation back" doctrine, on which the government relies here, was specifically intended to prevent fraudulent pre-conviction transfers to avoid forfeiture. In order to further the punitive purpose of depriving convicted criminals of the fruits of their crimes, *see United States v. Unit No. 7 and Unit No. 8*, 853 F.2d 1445, 1451 (8th Cir. 1988); *United States v. Lizza Industries*, 775 F.2d 492, 498 (2d Cir. 1985), the statute provides that "All right title and interest in property . . . [subject to forfeiture] vests in the United States upon commission of the act giving rise to forfeiture." 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). The intent was to reach preconviction transfers "to third parties acting as nominees or who have *knowingly* engaged in sham or fraudulent transactions." S. Rep. No. 225, 98th Cong., 2d Sess. 200, 209 n.47 (1984). These transactions do not include "arms length transactions" by the defendant with third parties. *Id.* at 201.

The relation-back doctrine therefore has no effect on most legitimate pre-conviction transfers, because the rights of bona fide purchasers for value—that is, anyone who received payment for goods or services from the accused without knowledge or "cause to believe" that the property would be subject to forfeiture—are specifically protected.[2] If applied to bona fide legal fees, that standard would either be a nullity that could never be satisfied or it would fundamentally and improperly undermine the attorney-client relationship. The criminal defense attorney is in a unique position because the very nature of

[2] Under the CFA, a court is authorized to grant post-trial relief from a forfeiture order to those who received assets from the defendant who either had a superior claim of title at the time of the criminal offense or who is "a bona fide purchaser for value of the right, title, or interest in the property [who] was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 18 U.S.C. § 1963(*l*)(6)(B); 21 U.S.C. § 853(n)(6)(B).

his services will often, and perhaps inevitably, entail knowledge of the possibility of forfeiture.

Unlike other persons who may do business with the accused, the defense attorney has a professional obligation to learn as much as possible about the actual and potential allegations against his client, including allegations that may ultimately lead to forfeiture. A threatened charge and an actual indictment would certainly provide some "notice" of potential forfeiture, but it is in those circumstances that an accused is most intensely in need of counsel of his own choosing in whom he may confide without reservation. Indeed it is a fundamental precept of our adversary system that full disclosure and complete confidence between attorney and client are essential to adequate representation. Thus, counsel's efforts to investigate the charges against his client will almost inevitably lead him to have some knowledge of the basis of the government's forfeiture allegations. Much of this information may be obtained through privileged communications; the rest may be attorney work product. The CFA and its legislative history disclose no legislative intent to discourage lawyers from representing persons suspected or accused of covered crimes, or to interfere with counsel's duty to become thoroughly familiar with the facts surrounding the government's case.

The absence of specific legislative guidance on the restraint or forfeiture of attorney's fees is persuasive evidence that Congress did not intend to precipitate dramatic changes in the adversary system or a defendant's right to counsel. The sole passage addressing the restraint and forfeiture of attorneys' fees is found in a House Report on a separate unenacted forfeiture bill. *See* H.R. Rep. No. 845, part 1, 98th Cong., 2d Sess. 19 n.1 (1984) (Report on Comprehensive Drug Penalty Act of 1984).[3] The extent of the legislative discussion on this

[3] The Comprehensive Drug Penalty Act, H.R. 4901, was passed by the House in 1984 and referred to the Senate. Although this bill was not acted upon by the Senate, many of its provisions were similar to the subsequently enacted Chapter III of the Comprehensive Crime Control Act.

question is limited to the statement that: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel."[4] No historical evidence exists to suggest that Congress intended the CFA to effect a dramatic shift in the traditional balance of power between adversaries in our criminal justice system.

Of course, if the government demonstrates that counsel engaged in a fraudulent or sham transaction to evade forfeiture, a different result would obtain. Congress intended to reach 'third parties . . . who have knowingly engaged in sham or fraudulent transactions." S. Rep. No. 225, at 209 n.47.[5] Here the government has not challenged the bona fide character of the disputed attorneys' fees and this question, thus, is not at issue.

A construction of the statute excluding bona fide attorneys' fees also is necessary to avoid a multitude of serious constitutional infirmities. A cardinal principle of statutory construction requires that courts "first ascertain whether a construction of the statute is fairly

[4] H.R. Rep. No. 845, part 1, at 19 n.1. The House Judiciary Committee therefore declined to resolve the prior conflict in district court opinions on the use of restraints impinging on counsel fees. *Id.*

[5] In addition, the 1984 Act provides other sanctions that a court might invoke where there is reason to believe that an attorney is assisting the defendant in a sham or fraudulent transfer of his assets. The "alternative fine" provided by Congress in 1984, *see* 18 U.S.C. 1963(a); 21 U.S.C. § 853(a), permits the court to impose a fine of up to twice the defendant's criminal profits, thus enabling the court to deal severely with any attempt by the defendant to shield his assets through an improper use of the attorney-client relationship. Similarly, if defense counsel particiaptes in such a scheme to assist the defendant in defrauding the government, the government will have recourse against defendant and defense counsel alike.

possible by which [a constitutional] question may be avoided."[6] *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Moreover, as this Court has held, if the construction of the plain language of a statute presents a significant risk that constitutional rights will be infringed, such a construction must be supported by a "clear expression of an affirmative intention of Congress." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). In the absence of such unequivocal Congressional intent, this Court has not hesitated to construe statutes in a manner that would avoid reaching difficult constitutional issues. *Id.* at 507.

As succeeding sections of this brief explore, the use of the forfeiture provisions to reach bona fide legal fees would raise constitutional questions of sufficient magnitude as to invoke these principles. Fee forfeiture and pre-trial restraints on fees implicate serious questions under the Fifth and Sixth Amendments. And neither the CFA itself, nor its legislative history, contains any clear expression of a Congressional intent to bring bona fide attorneys' fees within the reach of the criminal forfeiture laws. Indeed, Congressmen intimately involved with the passage of the CFA have confirmed that they never considered, much less intended, such a result. *See* Forfeiture Issues: Hearing Before House of Representativs Subcommittee on Crime, Committee on the Judiciary, 99th Cong., 1st Sess. 178 (1985) (statement of Rep. Shaw); Field Hearing on Federal Drug Forfeiture Activity: Hearing Before House of Representatives, Subcommittee on Crime, Committee on the Judiciary, 100th Cong., 2d Sess. 177, 181 (1988) (statements of Rep. Shaw and Chairman Hughes).

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[6] An equally fundamental principle instructs that ambiguous criminal statutes must be narrowly construed. *McNally v. United States*, 107 S. Ct. 2875, 97 L.Ed.2d 292, 302 (1987); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The rule of lenity has been applied to the criminal forfeiture laws. *See, e.g., United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987).

The troubling constitutional issues raised by fee forfeiture have convinced many, although not all, courts that have construed the CFA to interpret the Act narrowly so as to exempt bona fide attorneys' fees.[7] *See, e.g., United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1986); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo 1985). *See also United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988) (*en banc*) (Winter, J., concurring). *Contra United States v. Nichols*, 841 F.2d 1485, 1493-96 (10th Cir. 1988); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988). The ABA supports the well reasoned conclusions of these courts that the forfeiture laws do not apply to fees paid or payable to defense counsel fulfilling their legitimate and constitutionally prescribed role of providing an effective defense and do not justify pretrial seizures of assets that are reasonably necessary to pay bona fide fees to counsel.

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[7] In a concurring opinion in *United States v. Monsanto*, Judge Winter, joined by two other judges, construed the statute narrowly, but without addressing these constitutional difficulties. Judge Winter concluded that the CFA vests discretion with the court to restrain assets identified in an indictment as subject to forfeiture, including counsel fees, and that this discretion is to be guided by traditional equitable principles. In reaching this conclusion, Judge Winter focused on the "permissive" nature of the statutory language which states that a court "may" enter a restraining order. After balancing the relative hardships to the parties, Judge Winter concluded that the government's nominal property rights in potentially forfeitable assets do not outweigh the hardship imposed on a defendant who is prevented from retaining private counsel of choice. For substantially the same reasons, he further concluded that once a district court finds that counsel fees are exempt from pre-trial restraint, those assets are exempt from subsequent post-conviction forfeiture.

II. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO COUNSEL.

Fee forfeiture threatens core constitutional issues of profound significance to our adversary system of criminal justice. The potential impact of these constitutional infirmities is far-reaching; Congress has authorized criminal forfeiture as a sanction for an estimated 25% of the criminal cases brought in federal courts, *United States v. Nichols*, 841 F.2d at 1488, and the list of offenses for which forfeiture is a sanction has steadily increased.[8] Accordingly, the ABA urges that, if the Court finds that fee forfeiture is authorized by statute, the Court should hold that fee restraints and fee forfeiture infringe on rights secured by the Sixth Amendment.

A. Fee Forfeiture Violates a Defendant's Sixth Amendment Right to Counsel of Choice.

The Sixth Amendment guarantees that a criminal defendant with the resources to retain counsel has the right to choose his or her own counsel. *Wheat v. United States*, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Courts are reluctant to dishonor the defendant's choice of counsel because "[e]mbodied within the Sixth Amendment is the

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[8] In 1984, for example, Congress expanded the class of offenses for which forfeiture is possible to include all drug offenses, obscenity offenses, and violations of the Currency and Foreign Transactions Reporting Act. *See* 18 U.S.C. § 1961(1). In 1986, Congress created broad new money-laundering offenses, codified at 18 U.S.C. §§ 1956, 1957, for which forfeiture is a possible sanction. *See* 18 U.S.C. § 1961(1). In 1988, Congress enacted legislation adding additional offenses, such as credit card fraud, 18 U.S.C. § 1029, and copyright infringement, 18 U.S.C. § 2319, to this expanding list of offenses for which forfeiture is a possible sanction.

conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California*, 422 U.S. 806 (1975), and *Brooks v. Tennessee*, 406 U.S. 605 (1972)). *See also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). "It is from this principle and belief that the defendants' right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura*, 607 F.2d at 56.

Admittedly, the right to counsel of choice is a qualified right. It is conditioned, initially, on the accused having sufficient assets to hire the lawyer of his choice. For example, when an impecunious defendant desires to have the court appoint a particularly celebrated defense counsel, the court is not obliged to enforce that preference. That, of course, is a far cry from allowing a court, at the instance of the prosecution, to strip the accused of assets so that he cannot retain the otherwise available counsel of his choice.

Moreover, the right to counsel of choice, where sufficient assets to pay the attorney are available, may be overcome in limited circumstances when the orderly administration of justice so requires. As almost every court that has considered the issue has recognized, the government may have other legitimate countervailing interests—such as an interest in acquiring all property allegedly traceable to illegal activity—but those interests must be weighed against the defendant's right to select counsel. *See United States v. Unit No. 7 and Unit No. 8*, 853 F.2d at 1450-51; *United States v. Nichols*, 841 F.2d at 1502. *See also United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc) (Feinberg, J. with Oakes & Kearse, JJ. concurring). The majority of the Fourth Circuit *en banc* in *Caplin & Drysdale*, however, never undertook to apply the required Sixth

Amendment balancing test because it incorrectly concluded that a defendant has *no* ownership interest in allegedly forfeitable assets and the qualified right to counsel "does not apply at all in the fee forfeiture context." *United States v. Caplin & Drysdale*, 837 F.2d 637, 644 (4th Cir. 1988) (en banc).

In so holding, the court apparently relied on the "relation back provision" of the CFA, which, upon conviction, vests title to the defendant's forfeitable assets in the government, as of the date the assets were illegally acquired or used. The court thus viewed the government's mere allegations of forfeiture in the indictment, in conjunction with the relation back doctrine, as sufficient to divest the defendant of any property interest in the contested assets. In sum, the court concluded, the defendant against whom an unproved claim of forfeiture has been made "does not have the legal assets that entitle him to a right to counsel of choice in the first place." *Id.*

The ABA submits that this analysis simply fails to take account of the presumption of innocence. By asserting that the relation back doctrine bars a defendant's use of allegedly forfeitable property to pay his attorney, the Fourth Circuit in essence concluded that these assets are indeed forfeitable. This conclusion strikes at the very core of our adversary system under which the defendant is presumed innocent and his assets are thus presumptively legitimate. The relation back doctrine, which is triggered only upon conviction, *United States v. Nichols*, 841 F.2d at 1498; *United States v. Thier*, 801 F.2d 1463, 1476 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), does not purport to eliminate the presumption of innocence prior to trial nor does it authorize the imposition of punitive sanctions prior to a conviction. Thus, until the defendant has been convicted, the government must offer some justification sufficiently

compelling to override the defendant's right to utilize his presumptively legal assets in his own defense.[9]

When the proper Sixth Amendment balancing test is applied, a defendant's interest in choosing counsel outweighs the government's interest in forfeiting bona fide attorneys' fees. The only interest of the government lies in preserving the availability of the defendant's assets so that they may be forfeited after a possible guilty verdict at trial. That interest is essentially punitive—to deprive the guilty defendant of the enjoyment of the fruits of his illegal activity. *United States v. Unit No. 7 and Unit No. 8*, 853 F.2d at 1451; *United States v. Lizza Industries*, 775 F.2d 492, 498 (2d Cir. 1985). Although the ABA fully supports the government's legitimate interest in using the forfeiture laws to punish convicted criminals, that interest is not sufficiently compelling to overcome the primacy of a defendant's interest in choosing his counsel prior to trial.

Indeed, the forfeiture of assets otherwise destined for payment of—or actually paid as—bona fide attorneys' fees serves little, if any, punitive value. Assets properly paid to counsel would be inaccessible to the defendant in any event, thus depriving the defendant of their economic

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[9] Contrary to the Fourth Circuit, the Eighth and Tenth Circuits recognize that fee restraints and forfeitures affect a defendant's right to choose counsel, thus requiring a weighing of the government's interests against the defendant's qualified Sixth Amendment right to choose counsel. *United States v. Unit No. 7 and Unit No. 8*, 853 F.2d 1445, 1450-51 (8th Cir. 1988); *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988); *See also United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (Feinberg, J. with Oakes & Kearse, JJ. concurring). On the other hand, the Seventh Circuit, which has adopted the Fourth Circuit's conclusion that the relation back doctrine divests a defendant of any interest in allegedly forfeitable assets prior to trial, has nonetheless held that, before trial, a defendant has a sufficient interest in using his property to pay counsel to warrant the Fifth Amendment protections of due process. *See United States v. Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988).

value. *United States v. Thier*, 801 F.2d at 1474-75. In contrast, the clear and direct infringement on a defendant's constitutional rights wrought by fee forfeiture would be substantial.

Nor should this Court sanction the Fourth Circuit's suggestion that the general penal goals underlying the forfeiture statute should encompass efforts to strip defendants of their ability to hire private qualified defense counsel. Contrary to the Fourth Circuit's majority opinion, neither the CFA nor its legislative history contains *any* evidence of a Congressional intent to prevent payment of legitimate attorneys' fees either before, during or after trial. Moreover, while weakening the ability of an accused to defend himself at trial by denying him private counsel of choice undoubtedly would provide a significant advantage to the government, the ABA believes such objectives to be both an illegitimate exercise of government power and constitutionally infirm. *See United States v. Monsanto*, 852 F.2d at 1403 (Feinberg, J. with Oakes & Kearse JJ., concurring). The impairment of a defendant's right to select counsel even before a verdict of guilt is obtained would amount to little more than imposition of punishment prior to trial in clear violation of the accused's right to due process of law.

The grave ramifications caused by fee forfeiture will often be sufficient to deprive a defendant of *any* ability to retain counsel of choice prior to an adjudication of guilt or innocence. Even those defendants with sufficient, presumptively legal, assets to retain counsel of choice may well be unable to do so because of the chilling effect of possible restraints or forfeiture on counsel's willingness to undertake representation.[10] *United States v.*

[10] As this Court has recently observed, "It is a rare attorney who will be fortunate enough to learn the entire truth from his client, much less be fully apprised of what each of the government's witnesses will say on the stand." *Wheat v. United States*, 108 S.Ct. 1692, 100 L.Ed.2d 140, 152 (1988). If fee forfeiture is permitted,

Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *United States v. Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986). The government's nominal interest in preserving assets for possible forfeiture cannot justify this serious erosion of Sixth Amendment rights.

B. The Prior Restraint and Forfeiture of Bona Fide Attorneys' Fees Violates the Defendant's Sixth Amendment Right to Effective Assistance of Counsel.

The use of the forfeiture laws against bona fide attorneys' fees also deprives the defendant of the attorney-client relationship necessary for the effective assistance of counsel guaranteed by the Sixth Amendment.

If attorneys' fees are subject to forfeiture after trial, defense counsel's collection of earned fees is contingent on the outcome of the trial—a situation that raises serious ethical concerns. The ABA Model Rules of Professional Conduct declare: "A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." Model Rules of Professional Conduct Rule 1.5(d)(2). *See also* Model Code of Professional Responsibility DR 2-106(C).

In addition, the Rules prohibit representation of a client in a matter affecting the attorney's personal financial interests. Rule 1.7(b) of Model Rules of Professional Conduct; *see also* Model Code of Professional Responsibility DR 5-101(A). Defense counsel faces an intolerable conflict of interest created by his pecuniary interest in the outcome of the litigation. If counsel fees are indeed forfeited at trial, the sole statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears

both of these rare events will have to occur before defense counsel could have any degree of confidence that his fees would be safe from possible forfeiture.

the burden of proving his ignorance of the facts which support the forfeiture verdict. *See* 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(m)(6). Whereas, before and during trial, counsel must investigate and master all relevant evidence to defend his client, after trial, counsel must prove his ignorance of both the facts leading to fee forfeiture and the government's forfeiture contentions.[11] Thus, "the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with the proceeds of illegal activity." *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc).

Defense counsel faces other conflicts of loyalty as well that pose serious dilemmas under the ethical rules that guide the legal profession. For example, defense counsel will have a conflict in advising his client about a possible plea bargain that touches upon the forfeitability of the defendant's assets. Conflicts affecting such negotiations have been noted by a number of courts. *See United States v. Bassett*, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc); *United States v. Reckmeyer*, 631 F. Supp. at 1197; *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

Finally, a statutory scheme that makes a litigable issue out of the state of defense counsel's knowledge risks a profound intrusion on attorney-client communications. Trial and grand jury subpoenas may be issued to defense counsel to testify regarding the amount and

[11] Counsel thus also has a financial interest in not placing his factual and legal knowledge about the potential forfeitability of the defendant's assets on the record during the course of the criminal proceedings.

method of fee payments so as to demonstrate the forfeitability of the payments.[12] These place defense counsel in the untenable position of being a witness against his own client.[13] Such inquiries before, during, and after trial, which necessarily focus on counsel's knowledge of the defendant's financial activities, will chill attorney-client communications.

These multiple conflicts of interest are not answered, as the Fourth Circuit suggested below, by assuming that counsel, acting within the bounds of the canons of ethics, will be able to overcome them. Even the most conscientious defense attorney, faced with the prospect of an actual personal conflict with his client, may find it difficult to provide the undivided loyalty and independent judgment that professional ethics require and that the Constitution presupposes in protecting the accused's right to the *effective* assistance of counsel. *See, generally Strickland v. Washington*, 466 U.S. 668 (1984).

Moreover, wholly apart from the corrosive influence a conflict of interest has on counsel's ability to provide independent judgment to his client, judicial tolerance of such conflicts will undermine public confidence in the integrity of our criminal justice system. As this Court recently observed, "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 108 S.Ct. 1692, 100 L.Ed.2d 140, 149 (1988).

[12] In February, 1986, the ABA House of Delegates adopted a resolution endorsing a requirement for prior judicial review of subpoenas directed at defense counsel by the prosecution. The supporting ABA Report carefully analyzes the chilling effect of subpoenas on the attorney-client relationship.

[13] The ABA Model Rules generally forbids representation in any case in which counsel may be called as a witness, *see* Model Rule 3.7; Model Code DR 5-102.

Nor is it an answer, as the Fourth Circuit suggested below, that ineffective assistance of counsel claims based on conflicts of interest are "properly reviewed only on the individual facts of a particular case." *United States v. Caplin & Drysdale*, 837 F.2d at 647. As this Court has held, when a defense attorney labors under an actual conflict of interest, "prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. at 692; *United States v. Chronic*, 466 U.S. 648, 662 n.31 (1984).

The use of a pre-trial mini-hearing, as suggested by the panel opinion in *Monsanto*, will not eliminate these problems, but will simply advance the moment at which they become apparent. Initially, the defendant must face the question of who will represent him at the pre-trial mini-hearing. Retained counsel may be unwilling to prepare for a hearing addressing both the guilt of the defendant and the forfeitability of the defendant's assets when the fee for such work is uncertain.

In any event, assuming that the defendant retains counsel to handle the mini-hearing, almost every aspect of preparation will create difficult ethical questions. Because of the importance of the mini-hearing to both counsel's continued role and the defendant's choice of representation, the pressures will be strong to accelerate discovery and prepare in depth for the mini-hearing. Such preparation, in turn, will increase the stakes. Consequently, the term "mini-hearing" may well be a misnomer as defense counsel may have a personal interest in protracting the proceedings to challenge the government's contentions.

Should the government prevail at the mini-hearing, however, retained counsel, as a practical matter, may be required to withdraw because full payment of his fee would be contingent on the outcome of the trial. In addition, if trial results in an adverse verdict on the forfeiture allegations, the only means for counsel to recover

for effort previously invested in the case would be to demonstrate, at a post-trial forfeiture hearing, a lack of knowledge that any payments made to counsel stemmed from forfeitable assets. *See* 18 U.S.C. § 1963(*l*); 21 U.S.C. § 853(n)(6). Thus, even prior to the mini-hearing, retained counsel must deal with the dilemma that any knowledge he acquires to prepare for the mini-hearing may later be used against him to preclude post-trial relief.

The appointment by the court of different counsel to handle the mini-hearing or other aspects of pre-trial preparation would have other disadvantages. First, current law does not generally permit appointment of counsel before initiation of formal adversary judicial proceedings. *See United States v. Hershon*, 625 F. Supp. 735 (D. Mass. 1986) (no constitutional right to appointment of counsel for grand jury witness). In contrast, private counsel are frequently retained months or even years earlier. By the time a public defender or other counsel has been appointed, the defense attorney will have confronted all of the conflicts discussed above and the defendant's legitimate interests may already have been compromised.

Moreover, the forced substitution of appointed counsel late in the criminal proceeding places appointed counsel at a distinct disadvantage. Our system of appointed representation is designed to serve the truly indigent and can ill afford the burdens associated with systematic substitution of appointed counsel into both complex and even routine criminal cases. *See* Concerning Forfeiture of Attorneys' Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (statement of Federal Public Defender Edward Marek, on behalf of Federal Public Defenders and Federal Community Defenders). The immediate consequences of this added burden will fall on truly indigent defendants, who will now compete with non-indigent defendants for the

dwindling and overtaxed resources of appointed federal defenders.

Finally, the timing of an application for a pretrial restraining order, and the invocation of the relation back doctrine are left, in the first instance, to the unfettered discretion of the prosecution. *See* 21 U.S.C. §§ 853(c), (e); 18 U.S.C. §§ 1963(c), (e). As a practical result, such a restraining order will likely cause counsel to withdraw, because many lawyers may not wish to handle such cases without compensation. This would vest the prosecution with the discretionary authority to disengage the services of chosen defense counsel at any stage in the criminal proceeding. The prospect of the government exercising a veto power over the attorney-client relationship casts a cloud over the effective representation provided by counsel. This Court has already determined that: "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. at 687; *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

For these reasons, neither the requirement of a mini-trial nor the appointment of counsel will eliminate the substantial concerns about the effectiveness of the legal assistance provided to the defendant where fee payments are subject to forfeiture.

III. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO DUE PROCESS.

Fee forfeiture also violates due process because it gives the government an ability to control the resources of the defense. The Due Process Clause "does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). "There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

Prior restraints and subsequent forfeiture of bona fide fees enable government counsel to determine who will be his adversary, to restrict the resources available to present a defense, and even to determine the time when chosen counsel will withdraw. The independence of defense counsel is compromised by the prospect of continued representation only by the grace of the prosecution. Fundamental fairness, which is guaranteed by the Fifth Amendment, *see Estelle v. Williams*, 425 U.S. 501, 505 (1976); *Powell v. Alabama*, 287 U.S. 45, 63 (1932), demands that the defendant not be handicapped in this way in the presentation of his defense. A system that affords one party to a controversy the discretion to restrict the resources available to its opponent to contest the very allegations at issue is no longer an adversarial system within the rubric of our American tradition.

The confidence that our society must place in the judgments entered in our criminal justice system requires nothing less than a test of the evidence by true adversaries. Our system of criminal justice is predicated on the assumption that the vigorous assertion of a defendant's rights "will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Chronic*, 466 U.S. at 655 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Our adversary system demands that the government prevail by proving its allegations, not by crippling an accused's ability to mount a defense.

CONCLUSION

For the foregoing reasons, the ABA submits that the prior restraint and forfeiture of bona fide attorneys' fees paid for services legitimately rendered in defending a criminal charge are not encompassed by the forfeiture statutes and are not tolerated by the United States Constitution.

Respectfully submitted,

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